BRIEF APPENDIX A

Notification and Request for Designation of Three-Judge Court

(Filed February 20, 1970)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

Civil Action No. 1974

JAMES E. SWANN, *et al.*,

Plaintiffs,

—vs.—

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, a public body corporate; WILLIAM E. POE; HENDERSON BELK; DAN HOOD; BEN F. HUNTLEY; BETSY KELLY; COLEMAN W. KERRY, JR.; JULIA MAULDEN; SAM McNINCH, III; CARLTON G. WATKINS; THE NORTH CAROLINA STATE BOARD OF EDUCATION, a public body corporate; and, DR. A. CRAIG PHILLIPS, Superintendent of Public Instruction of the State of North Carolina,

Defendants,

—and—

HONORABLE ROBERT W. SCOTT, Governor of the State of North Carolina; HONORABLE A. C. DAVIS, Controller of the State Department of Public Instruction; HONORABLE WILLIAM K. McLEAN, Judge of the Superior Court of Mecklenburg County; TOM B. HARRIS; G. DON ROBERSON; A. BREECE BRELAND; JAMES M. POSTELL; WILLIAM E. RORIE, JR.; CHALMERS R. CARR; ROBERT T. WILSON; and the CONCERNED PARENTS ASSOCIATION, an unincorporated association in Mecklenburg County; JAMES CARSON and WILLIAM H. BOOE,

Additional Parties-Defendant.

Several orders, starting April 23, 1969, have been entered by this court dealing with pending motions for

desegregation of the Charlotte-Mecklenburg schools. The orders of December 1 and December 2, 1969, and February 5, 1970, are attached as Exhibits A, B and C to this motion.

The December 2, 1969 order appointed Dr. John A. Finger, Jr. to assist the court in the preparation of a plan for the desegregation of the schools. The February 5, 1970 order directs the schools to be desegregated according to various principles described or referred to in the order, including the requirement erroneously advertised as "involuntary bussing to achieve racial balance" which reads as follows:

> "That transportation be offered on a uniform non-racial basis to all children whose attendance in any school is necessary to bring about the reduction of segregation, and who live farther from the school to which they are assigned than the Board determines to be walking distance."

A suit has been filed in the General Court of Justice, Superior Court Division, Mecklenburg County, North Carolina, No. 70-CVS-1097, entitled "Tom B. Harris, G. Don Roberson, et al., Plaintiffs, vs. William C. Self, Superintendent of Charlotte-Mecklenburg Schools, and Charlotte-Mecklenburg Board of Education, Defendants," and pursuant to allegations made in that action, Judge W. K. McLean, of the Superior Court of North Carolina, has entered an order temporarily restraining the School Board and the Superintendent from paying Dr. Finger's bills until they have been approved by the Board of Education, and ordering that "the defendant Charlotte-Mecklenburg Board of Education and its agents, servants and employees be and they hereby are enjoined and restrained from ex-

pending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district."

The complaint, the amended complaint and the two orders of Judge McLean dated February 12, 1970, are attached hereto as Exhibit D.

The Governor of North Carolina has made a public statement, Exhibit E, and has written a letter to the Department of Administration, Exhibit F.

The State Superintendent of Public Instruction, a party to this case, has made a public statement, Exhibit G.

Reports received from the School Board on February 12, 1970 and February 19, 1970 fail to mention Judge McLean's order, and to indicate that the Board have appealed or intend to appeal Judge McLean's order; and these reports also reveal no action by the Board or school staff addressed to the transportation problem. It appears that whether the action of Judge McLean and the other state officials do or do not directly conflict with this court's orders, the practical effect of those actions is or may be to delay or defeat compliance with the orders of this United States Court.

The plaintiffs have filed a motion to make additional parties, and have requested this court to enter orders dissolving Judge McLean's restraining orders and directing the Governor, the State Department of Instruction and the "Concerned Parents Association" and their attorneys and others not to interfere further with the compliance of the School Board with the orders of this court.

Some of the issues raised by this situation may involve

the constitutionality of a state statute and others may be matters, cognizable by a single judge.

It appearing to the court that pursuant to Title 28, U.S.C.A., this matter should be heard and determined by a district court of three judges.

Now, THEREFORE, it is respectfully requested that the Chief Judge of the United States Court of Appeals for the Fourth Circuit designate two other judges, at least one of whom shall be a circuit judge, to serve with the undersigned district judge as members of the court to hear and determine the action.

This the 19th day of February, 1970.

/s/ JAMES B. MCMILLAN
James B. McMillan
United States District Judge

Exhibit A

(Opinion and Order of December 1, 1969)

(See Appendix in No. 281, p. 698a)

Exhibit B

(Opinion and Order of February 5, 1970)

(See Appendix in No. 281, p. 819a)

Exhibit C

(Order dated December 2, 1969)

(See Appendix in No. 281, p. 717a)

Exhibit D

(Complaint)

(Filed January 30, 1970)

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

70-CVS-1077

TOM B. HARRIS, G. DON ROBERSON, A. BREECE BRELAND, JAMES M. POSTELL, WILLIAM E. ROBIE, JR., CHALMERS R. CARR, and ROBERT T. WILSON,

Plaintiffs,

—VS.—

WILLIAM C. SELF, Superintendent of Charlotte-Mecklenburg County Schools,

—and—

JUANITA I. CADIEU, Treasurer of Mecklenburg County,

Defendants.

The plaintiffs, complaining of the defendants, allege and say:

1. That the plaintiffs, and each of them, are citizens, residents and taxpayers of Mecklenburg County, North Carolina, and the plaintiffs bring this action on behalf of all taxpayers of Mecklenburg County, North Carolina.

2. That the defendant, William C. Self, has heretofore been duly appointed as Superintendent of the Charlotte-

Mecklenburg Schools by the Charlotte-Mecklenburg Board of Education and is, and has at all times herein in question, been acting in said capacity.

3. That the defendant, Juanita I. Cadieu, is the duly elected and qualified Treasurer of Mecklenburg County, North Carolina, and is, and has at all times herein in question, been acting in said capacity.

4. That the plaintiffs are informed, believe and therefore allege that the Charlotte-Mecklenburg Board of Education did on or before June 15, 1969, present a request to the Mecklenburg County Board of Commissioners for funds to operate the public schools of Mecklenburg County, North Carolina, for the fiscal year 1969-1970, which request was in the form of a Budget setting forth specific items of expenditure, and all as required and provided by the North Carolina General Statutes.

5. That the plaintiffs are informed, believe and therefore allege that subsequent thereto, and on or before August 1, 1969, the Tax Levying Authority of Mecklenburg County, North Carolina, to wit, Mecklenburg County Board of Commissioners, did approve a Budget for specific items of expenditure, all as required and in accordance with the North Carolina General Statutes.

6. That the Tax Levying Authority, to wit, Mecklenburg County Board of Commissioners, did provide the public funds for the items of expenditure approved in the Budget, for the operation of the public schools of Mecklenburg County, North Carolina, for the fiscal year 1969-1970.

7. That the plaintiffs are informed, believe and therefore allege that on or about December 31, 1969, or shortly

thereafter, the defendant Superintendent, William C. Self, approved and signed a voucher authorizing payment of public funds to Professor John A. Finger, Jr. in the sum of $1,967.75, covering an alleged item of expenditure for a period from December 2, 1969 through December 31, 1969.

8. That the plaintiffs are informed, believe and therefore allege that the defendant Treasurer, Juanita I. Cadieu, did honor the voucher approved and signed by the defendant Superintendent, William C. Self, and did accordingly pay the sum of $1,967.75 from tax and other public funds to the said Professor John A. Finger, Jr.

9. That since the initial approval of the 1969-1970 Budget, the Charlotte-Mecklenburg Board of Education has made only one request to the Tax Levying Authority, which was about November, 1969, for an additional item of expenditure, over and above the approved Budget, which request was for compensatory education, which request was approved, and other than that one request, no necessity has been shown nor request made to the Tax Levying Authority to add items of expenditure which were not initially included in the said Budget.

10. That the said payment of $1,967.75 to Professor John A. Finger, Jr. was not for an item of expenditure included in the 1969-1970 Budget presented by the Charlotte-Mecklenburg Board of Education and approved by the Mecklenburg County Board of Commissioners, nor was it included in the one other additional item of expenditure requested and approved about November, 1969, for compensatory education.

Exhibit D—Complaint

11. That the act of the defendant Superintendent, William C. Self, in approving and signing a voucher authorizing payment of taxes and other public funds to Professor John A. Finger, Jr. was highly improper and illegal and in violation of the General Statutes of North Carolina and the Constitution of North Carolina.

12. That moreover and in addition thereto, the plaintiffs are informed, believe and therefore allege that the said Professor John A. Finger, Jr. has never been employed by the Charlotte-Mecklenburg Board of Education, that the Charlotte-Mecklenburg Board of Education has never entered into a contract with the said Professor John A. Finger, Jr. for the rendering of any services by him to the Charlotte-Mecklenburg Board of Education nor for the payment of any funds to him nor authorized or requested such, and the said Professor John A. Finger, Jr. has never rendered any public service to the Charlotte-Mecklenburg Board of Education nor to the citizens and taxpayers of Mecklenburg County, North Carolina, and such payment or further payments are tantamount to exclusive or separate emoluments or privileges from the community and in addition any voluntary acts on the part of Professor John A. Finger, Jr. were and are highly unnecessary to the operation of a public school system in Mecklenburg County, North Carolina, and all of which is highly improper and illegal and in direct violation of the North Carolina General Statutes and in violation of Section 7 of Article I, Section 23 of Article I, Section 38 of Article I, Section 6 of Article VII, Section 7 of Article VII, Section 5 of Article IX, and other provisions of the Constitution of North Carolina and the Constitution of the United States of America.

Exhibit D—Complaint

13. That the act of the defendant Treasurer, Juanita I. Cadieu, in honoring the aforesaid voucher approved and signed by the defendant Superintendent, William C. Self, is likewise unlawful for the reasons heretofore set forth.

14. That the plaintiffs are informed, believe and therefore allege that the defendant Superintendent, William C. Self, is imminently about to approve and sign another voucher or vouchers authorizing payment of tax or other public funds to the said Professor John A. Finger, Jr. for similar illegal items of expenditures, and unless the defendant Superintendent, together with the defendant Treasurer, are enjoined from making such payment or payments, the plaintiffs and all other taxpayers and citizens and residents of Mecklenburg County and State of North Carolina will be irreparably damaged.

15. That the plaintiff are informed, believe and therefore allege that the defendants are not solvent to the extent of being able to respond or make restitution with reference to the extent and amount of the aforesaid illegal payment that has been made and those that are about to be made and further that the recipient of said illegal payments is a non-resident of North Carolina and is not subject to the jurisdiction of the Courts of this State and that the plaintiffs do not have an adequate remedy at law and unless the defendants are restrained and enjoined from making further such illegal payments from tax and other public funds, which they are threatening to do and are imminently about to do, then the plaintiffs and all other similarly situated citizens, residents and taxpayers of Mecklenburg County, North Carolina, will suffer immediate and irreparable damage.

Exhibit D—Complaint

WHEREFORE, the plaintiffs respectfully pray the Court:

1. That a temporary restraining order and injunction be issued against the defendants, and each of them, and their agents and servants, enjoining and restraining them from approving and signing any voucher or vouchers authorizing payment of tax or other public funds to Professor John A. Finger, Jr. and further restraining and enjoining them from making any payment to Professor John A. Finger, Jr. from tax or other public funds of Mecklenburg County and the State of North Carolina, pending the further orders of this Court;

2. That the defendants, and each of them, be directed and ordered to be and appear before a Judge of the Superior Court residing in or assigned to hold and preside over the Courts of the 26th Judicial District of North Carolina and show cause, if any they have, why the plaintiffs motion should not be allowed to the affect that a preliminary injuction be continued in effect, pending the final determination of this action.

3. That the Complaint be accepted and treated as an affidavit in this cause;

4. That the defendants, and each of them, be permanently enjoined and restrained from approving and signing any voucher or vouchers authorizing payment of tax or other public funds to Professor John A. Finger, Jr. and further enjoining them from making any payment to Professor John A. Finger, Jr. from tax or other public funds of Mecklenburg County and the State of North Carolina;

5. The plaintiffs demand a jury trial on all issues arising in this cause;

6. For such other and further relief as the plaintiffs may be entitled to in the premises.

/s/ WILLIAM H. BOOE
William H. Booe
Charlotte, North Carolina 28202
Attorney for the Plaintiffs

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

TOM B. HARRIS, G. DON ROBERSON, A. BREECE BERLAND, JAMES M. POSTELL, WILLIAM E. RORIE, JR., CHALMERS R. CARR, and ROBERT T. WILSON, first being duly sworn, depose and say:

That they are the plaintiffs in the above-entitled action and that they have read the foregoing COMPLAINT and know the contents thereof; that the same is true of their own knowledge, except as to those matters and things therein stated upon information and belief, and as to those matters and things, they believe them to be true.

Exhibit D—Complaint

/s/ TOM B. HARRIS
Tom B. Harris

/s/ G. DON ROBERSON
G. Don Roberson

/s/ A. BREECE BRELAND
A. Breece Brelind

/s/ JAMES M. POSTELL
James M. Postell

/s/ WILLIAM E. RORIE, JR.
William E. Rorie, Jr.

/s/ CHALMERS R. CARR
Chalmers R. Carr

/s/ ROBERT T. WILSON
Robert T. Wilson

Sworn to and subscribed before me
this 29th day of January, 1970.
(Illegible)
Notary Public

My Commission Expires: 4-13-71

(Amended Complaint)

(Filed February 12, 1970)

The Plaintiffs, complaining of the defendants, for a first cause of action, allege and say:

That Paragraphs 1 through 15 inclusive, as alleged and set forth in this complaint filed herein are reasserted and alleged and incorporated herein by reference as fully and completely as though expressly set forth herein.

THE PLAINTIFFS, COMPLAINING OF THE DEFENDANTS, FOR A SECOND CAUSE OF ACTION, ALLEGE AND SAY:

1. That the plaintiffs, and each of them, are citizens, residents and taxpayers of Mecklenburg County, North Carolina, and the plaintiffs bring this action on behalf of all taxpayers of Mecklenburg County, North Carolina.

2. That the defendant, Charlotte-Mecklenburg Board of Education is a body corporate, and located in Mecklenburg County, North Carolina.

3. That the plaintiffs are informed, believe and therefore allege that the defendant Board is about to expend large sums of money from tax and other public funds for the purpose of purchasing buses and other such motor vehicles and for renting such vehicles and for the maintenance, upkeep and operation of such vehicles for the purpose of involuntarily transporting pupils and students in the Charlotte-Mecklenburg School system for the purpose of ultimately creating a racial balance in the Charlotte-Mecklenburg School system.

4. That the General Assembly of North Carolina has heretofore duly enacted Section 176.1 of Article 21, Chapter 115 of the General Statutes of North Carolina which is

presently in effect and in part expressly provides: "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing."

5. That no funds have heretofore been appropriated by the tax levying authority for such purposes and in addition thereto the aforesaid acts on the part of the defendant Board are in direct violation of North Carolina General Statutes 115-176.1 and are unlawful.

6. That the plaintiffs are informed, believe and therefore allege that the defendant Board is imminently about to proceed with the expenditure of said funds for the purposes heretofore set forth and unless said defendant is enjoined therefrom the plaintiffs and all other taxpayers and citizens and residents of Mecklenburg County and State of North Carolina will be irreparably damaged.

7. That the plaintiffs are informed, believe and therefore allege that the defendant Board is not solvent to the extent of being able to respond or make restitution with reference to the extent and amount of the aforesaid illegal expenditures that are about to be made and that the plaintiffs do not have an adequate remedy at law and unless the defendant is restrained and enjoined from making such illegal expenditures from tax and other public funds, which the defendant is threatening to do and is imminently about to do, then the plaintiffs and all other similarly situated citizens, residents and taxpayers of Mecklenburg County, North Carolina, will suffer immediate and irreparable damage.

Exhibit D—Amended Complaint

WHEREFORE, the plaintiffs respectfully pray the Court:

1. That a temporary restraining order and injunction be issued against the defendants, and each of them, and their agents and servants, enjoining and restraining them from approving and signing any voucher or vouchers authorizing payment of tax or other public funds to Professor John A. Finger, Jr. and further restraining and enjoining them from making any payments to Professor John A. Finger, Jr. from tax or other public funds of Mecklenburg County and the State of North Carolina, pending the further orders of this Court;

2. That the defendants, and each of them, be directed and ordered to be and appear before a Judge of the Superior Court residing in or assigned to hold and preside over the Courts of the 26th Judicial District of North Carolina and show cause, if any they have, why the plaintiffs motion should not be allowed to the affect that a preliminary injunction be continued in effect, pending the final determination of this action;

3. That the defendant, and each of them, be permanently enjoined and restrained from approving and signing any voucher or vouchers authorizing payment of tax or other public funds to Professor John A. Finger, Jr. and further enjoining them from making any payment to Professor John A. Finger, Jr. from tax or other public funds of Mecklenburg County and the State of North Carolina;

4. That a temporary restraining order and injunction be issued against the defendant Charlotte-Mecklenburg School Board, its agents and servants, enjoining and restraining them from expending any money from tax or other

public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district.

5. That the defendant Board be directed and ordered to be and appear before a Judge residing in or assigned to hold the Courts of the 26th Judicial District of North Carolina and show cause why a preliminary injunction should not be continued in effect, pending the final determination of this action;

6. That the defendant Board, its agents and servants be permanently enjoined and restrained from expending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district;

7. That the amended complaint be accepted and treated as an affidavit in this cause;

8. The plaintiffs demand a jury trial on all issues arising in this cause;

9. For such other and further relief as the plaintiffs may be entitled to in the premises.

/s/ William H. Booe
510-14 Law Building
Charlotte, North Carolina 28202
Attorney for the Plaintiffs

Exhibit D—Amended Complaint

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

TOM B. HARRIS, being first duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action and that he has read the foregoing AMENDED COMPLAINT and knows the contents thereof; that the same is true of his own knowledge, except as to those matters and things therein stated upon information and belief, and as to those matters and things, he believes them to be true.

/s/ TOM B. HARRIS
Tom B. Harris

Sworn to and subscribed before me
this 12th day of February, 1970.

(Illegible)
Notary Public
My Commission Expires: 4-13-71

(Order)

(Filed on February 12, 1970)

THIS CAUSE coming on to be heard and being heard before the undersigned Judge presiding over the February 9, 1970, Schedule "L" Term of Superior Court of Mecklenburg County, North Carolina, upon the application and motion of the plaintiff, Tom B. Harris, for a restraining order and the Court treating the Amended Complaint filed in this action as an affidavit and for the purpose of this order, the Court hereby finds the facts to be as alleged and set forth in the Amended Complaint and further finds the plaintiffs are entitled to a temporary restraining order;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Tom B. Harris, execute and file with the Clerk an undertaking in the amount of $1,000.00 running to the defendant Board, conditioned as provided by law and upon the giving of such undertaking and approval by the Clerk, the defendant Charlotte-Mecklenburg Board of Education and its agents, servants and employees be and they hereby are enjoined and restrained from expending any money from tax or other public funds for the purpose of purchasing or renting any motor vehicles, or operating or maintaining such, for the purpose of involuntarily transporting students in the Charlotte-Mecklenburg School System from one school to another and from one district to another district.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Charlotte-Mecklenburg Board of Education be and it hereby is directed and ordered to be and appear before the Judge assigned and presiding over the Civil Term of Superior Court of Mecklenburg County, North Carolina, Wednesday, the 4th day of March, 1970, at 2:00 o'clock

P.M., in the Mecklenburg County Court House, Charlotte, North Carolina, and show cause, if any it may have, why this restraining order and a preliminary injunction should not be continued in effect pending a final determination of this cause.

IT IS FURTHER ORDERED that the Sheriff of Mecklenburg County serve a copy of this Order on the defendant, Charlotte-Mecklenburg Board of Education, and make return as by law provided.

This 12th day of February, 1970.

/s/ WILLIAM K. MCLEAN
Judge Presiding

(Order)

(Filed on February 12, 1970)

THIS CAUSE coming on to be heard and being heard before the undersigned Judge presiding over the Schedule "D" Civil Term of the Superior Court of Mecklenburg County, North Carolina, upon an order, which appears of record, directing the defendant, William C. Self, Superintendent of Charlotte-Mecklenburg Schools, to be and appear and show cause, if any he might have, why the restraining order, heretofore entered in this cause, should not be continued in effect pending a final determination hereof; William H. Booe appearing for the plaintiffs and William J. Waggoner appearing for the defendant Superintendent;

AND from the evidence presented, and for the purpose of this order, the Court finds the facts to be as alleged to be in the complaint; the Court further finds that the item of expenditure in question to Professor John A. Finger, Jr. was not included in the 1969-70 Budget and has never been officially considered by the Charlotte-Mecklenburg Board of Education, and the Court further finds that the General Statutes of North Carolina contain a procedure for consideration by the Board of items of expenditure which arise subsequent to the adoption of the Budget.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant, William C. Self, Superintendent of Charlotte-Mecklenburg Schools, and his agents, servants and employees, be and they hereby are restrained and enjoined from approving and signing any voucher or order authorizing or making any payment of tax or other public funds to Professor John A. Finger, Jr., until such time as

the Charlotte-Mecklenburg Board of Education approves the same.

The Court retains jurisdiction of this matter pending a final determination hereof.

This, the 12th day of February, 1970.

/s/ W. K. McLean
Judge Presiding

Exhibit E

(Statement by Governor Scott)

From: Governor Bob Scott
State Capitol/Raleigh
829-3991

FOR IMMEDIATE RELEASE

It has been called to my attention that the last session of the General Assembly enacted GS 115-176.1, which clearly states and provides that no public funds shall be used for involuntary bussing to achieve racial balance in the public schools of North Carolina. The law states: "Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

I have taken an oath to uphold the laws of North Carolina, and until this statute is declared unconstitutional, I shall not authorize the expenditure of any funds for such involuntary bussing.

I have always been against the bussing of students. I think it is disruptive. It destroys the neighborhood school concept.

The irony of all this is that nobody wants bussing. Blacks don't want it; Whites don't want it; teachers don't want it; parents don't want it; students don't want it—nobody wants it. Everyone wants freedom of choice to attend their neighborhood school.

2/11/70

Exhibit E—Statement by Governor Scott

SESSIONS LAWS—1969

CHAPTER 1274

In the General Assembly read three times and ratified, this the 2nd day of July, 1969.

H. B. 990 CHAPTER 1274

AN ACT TO PROHIBIT THE NEIGHBORHOOD SCHOOL SYSTEM AND TO PROHIBIT THE INVOLUNTARY BUSSING OF PUPILS OUTSIDE THE DISTRICT IN WHICH THEY RESIDE.

The General Assembly of North Carolina do enact:

Section 1. There is hereby created a new Section of Chapter 115 of the General Statutes to be codified as G.S. 115-176.1 and to read as follows:

"G.S. 115-176.1. *Assignment of pupils based on race, creed, color or national origin prohibited.* No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. No school attendance district or zone shall be drawn for the purpose of segregating persons of various races, creeds, colors or national origins from the community.

Where administrative units have divided the geographic area into attendance districts or zones, pupils shall be assigned to schools within such attendance districts; provided, however, that the board of education of an administrative unit may assign any pupil to a school outside of such attendance district or zone in order that such pupil may attend a school of a specialized kind including but not limited to a vocational school or school operated for, or operating programs for, pupils mentally or physically handicapped, or for any other reason which the

board of education in its sole discretion deems sufficient. No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this Article is prohibited, and public funds shall not be used for any such bussing.

The provisions of this Article shall not apply to a temporary assignment due to the unsuitability of a school for its intended purpose nor to any assignment or transfer necessitated by overcrowded conditions or other circumstances which, in the sole discretion of the School Board, require assignment or reassignment.

The provisions of this Article shall not apply to an application for the assignment or re-assignment by the parent, guardian or person standing in loco parentis of any pupil or to any assignment made pursuant to a choice made by any pupil who is eligible to make such choice pursuant to the provisions of a freedom of choice plan voluntarily adopted by the board of education or an administrative unit."

Sec. 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 3. If part of the Act is held to be in violation of the Constitution of the United States or North Carolina, such part shall be severed and the remainder shall remain in full force and effect.

Sec. 4. This Act shall be in full force and effect upon its ratification.

In the General Assembly read three times and ratified, this 2nd day of July, 1969.

Exhibit F

(Letter by Governor Scott)

[SEAL]

STATE OF NORTH CAROLINA
GOVERNOR'S OFFICE
RALEIGH 27602

ROBERT W. SCOTT
GOVERNOR

February 12, 1970

Dr. W. L. Turner
Director
Department of Administration
Raleigh, North Carolina

Dear Dr. Turner:

Chapter 1274, Session Laws of 1969, created a new section of Chapter 115 of the General Statutes, GS 115-176.1, which provides in part: "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of studens in contravention of this Article is prohibited, and public funds shall not be used for any such bussing."

No funds will be expended in violation of this Statute. No authorization will be given for use of any other funds to provide bussing to achieve school attendance for the purpose of creating a balance or ratio, religion or national origins.

Sincerely,

/s/ ROBERT W. SCOTT
Robert W. Scott

cc: Dr. Craig Phillips
Dr. Dallas Herring
Mr. A. C. Davis
Mr. Tom White

Exhibit G

(Statement by Mr. Craig Phillips)

This is the text of Dr. Craig Phillips' statement, handed out the same day:

"The governor has made an important statement today in clarifying his stand on the proposed 'involuntary bussing' of children in North Carolina schools, especially as currently ordered by the court for the Charlotte-Mecklenburg schools, to be initially effective April 1, 1970. I thoroughly concur with his conclusion that until G.S. 115-176.1, concerned with involuntary bussing and the use of public funds for such purpose, is declared unconstitutional he cannot authorize expenditure of funds for such involuntary bussing which might be undertaken in the future.

"To my knowledge, no such 'involuntary bussing' now exists in North Carolina. The mandate of the court in the Charlotte-Mecklenburg case and the subsequent protest response of many white and some black parents does indicate the possibility that an issue could arise on April 1, 1970 which would test the validity of the current North Carolina law on the matter.

"Most responsible educators are greatly concerned about the movement toward elimination of the community school as a recognizable educational institution. I firmly believe that the continuation of the community school concept is vital to the stability and effectiveness of our public school system in North Carolina, especially as it pertains to elementary children.

"I do not believe that the type of bussing of students as is being ordered in Charlotte-Mecklenburg is in the best interests of the youngsters directly involved, the Charlotte-Mecklenburg community or the State of North Carolina.

Exhibit G—Statement by Mr. Craig Phillips

"I do believe that North Carolina has made great progress toward the physical development statewide of unitary school systems (probably best defined most recently in the decision rendered by the Fifth District Court in its Georgia ruling) and we are ready to get on with the task of providing the kind of new, effective, educational programs so bady needed for all the boys and girls in the 152 school systems over the state.

"We must not defy the law. We can not hold to a long departed notion that "freedom of choice" alone will provide for unitary schools. We must find, within the framework of carefully considered legal structure, ways to forge ahead with a strong movement by citizens and professionals alike to reach levels of educational achievement not yet reached in North Carolina. The September 1970 establishment in all school systems of duly integrated faculties in a basic ratio of white and non-white in the community served; a constant, diligent effort on the part of everyone to find ways to achieve a reasonable balance of white and non-white youngsters in the school population (except by 'involuntary bussing' to achieve such mixing); strong, immediate community movement toward the eventual elimination of segregated housing, especially in urban areas and in a variety of planned activities geared toward closer regular communication between whites and non-whites leading to greater mutual understanding—all of these are necessary if we are to regain stability and assure quality in all our schools for all our children in North Carolina."

BRIEF APPENDIX B

Opinion and Order of Three-Judge District Court in *Alabama* v. *United States, et al.*, S.D. Ala., No. 5935-70-P, June 26, 1970

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

STATE OF ALABAMA, MACDONALD GALLION AS ATTORNEY GENERAL, STATE OF ALABAMA,

Plaintiffs,

versus

UNITED STATES OF AMERICA, CHARLES S. WHITE-SPUNNER, AS UNITED STATES DISTRICT ATTORNEY, OLLIE MAE DAVIS AS MOTHER AND NEXT FRIEND OF BETTY ANN DAVIS, AND JAMES ALLEN DAVIS, JERRIS LEONARD, AS CHIEF OF CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE, AND ROBERT H. FINCH, AS SECRETARY OF HEALTH, EDUCATION AND WELFARE, AND BIRDIE MAE DAVIS,

Defendants.

Before GEWIN, Circuit Judge, and THOMAS and PITTMAN, District Judges.

PER CURIAM:

A 1970 Special Session of the Alabama Legislature enacted a statute entitled, "An Act, To Prevent Discrimination on Account of Race, Creed or National Origin in Connection with the Education of the Children of the State of Alabama."[1] This Act was approved by the Governor of Alabama on March 4, 1970. In the present action the State

[1] The text of the statute is quoted *infra*.

of Alabama seeks a declaration that this enactment is constitutional. It also seeks to have this court modify prior judgments to conform to the strictures of this legislation, and to enjoin certain federal officers to conform their actions to its provisions.

The defendants in the present action are the parties plaintiff in *Davis* v. *Board of School Commissioners of Mobile County, Alabama,* S.D. Ala., Civil No. 3003-63, and certain officers of the United States. On 31 January 1970, this court entered an order in the *Davis* case requiring forthwith implementation of a desegregation plan for the Mobile schools. Following the adoption of the Act in question, the Board of School Commissioners by resolution instructed the school superintendent and staff to abide by the Act and to take no further steps in implementing the court-approved plan. The plaintiffs in the *Davis* case then sought leave to add the Governor and Attorney General of Alabama as parties defendant and to amend their complaint to seek a declaration that the subject Act is unconstitutional and an injunction against compliance with it.

Following a hearing, this court denied the plaintiff's motion. In his order Judge Thomas, discussing the subject Act, stated:

> In 1809, Chief Justice Marshall said: "If the legislators of the several states may, at will, annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."
>
> The School Board is required to follow the order of this Court of January 31, 1970, as amended, and if the

same is not followed within three days from this date, a fine of $1,000 per day is hereby assessed for each such day, against each member of the Board of School Commissioners.

The plaintiffs in this case, on the 10th day of May 1970, filed a petition requesting this Court to declare the Freedom of Choice Act of the Legislature of the State of Alabama unconstitutional. This case is not the proper vehicle in which to test the constitutionality of said Act. The said petition is therefore dismissed.

The State of Alabama through its Attorney General then instituted the present action joining as defendants the plaintiffs in the *Davis* case, the Chief of the Civil Rights Division of the Justice Department, Charles S. White-Spunner, as United States District Attorney, and the Secretary of Health, Education and Welfare. The present three-judge court was constituted by the Chief Judge of this circuit pursuant to the request of Judge Pittman, before whom this action was originally filed. In his order designating the panel, the Chief Judge states:

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the Three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both.

Brief Appendix B
Opinion and Order of Three-Judge District Court

In *California Water Service Co.* v. *Redding*,[2] the Supreme Court observed that the statutory requirement of a three-judge court is not applicable unless the constitutional claim regarding a state statute or administrative order is substantial. The Court then stated: "It is therefore the duty of a district judge, to whom an application is made for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented. . . ."[3] While "[t]heoretically, this solo travail should be the indispensable first step,"[4] such a procedure has often led to the impenetrable judicial snarl described in *Jackson* v. *Choate*.[5] Accordingly, it is now the preferred practice in the Fifth Circuit, in all but exceptional cases, to initially constitute the three-judge court and allow it to determine the issue of substantiality and the other issues in the case.[6] The procedure, envisioned in *Jackson*, tends to assure that the decision by the district court will be the final trial court action in the case. Regardless of the proper appellate course, the Court of Appeals or the Supreme Court will have the entire case for determination.[7]

In light of this procedure, the duty, described in *Redding*, to determine the substantiality of the federal question devolves upon the present panel. It is an elementary principle of law that a federal court has jurisdiction of a case,

---

[2] 304 U.S. 252 (1938). *See* Bailey v. Patterson, 369 U.S. 7 (1962).

[3] 304 U.S. at 254.

[4] Jackson v. Choate, 404 F.2d 910, 912 (5th Cir. 1968).

[5] 404 F.2d 910 (5th Cir. 1968).

[6] *Id.*

[7] *See* Hargrave v. McKinney, 302 F. Supp. 1381 (M.D. Fla. 1969); Rodriguez v. Brown, 299 F. Supp. 479 (W.D. Tex. 1969).

initially, to determine whether it has jurisdiction to ultimately decide the merits of the case.[8] As Chief Judge Brown observed in *Jackson*, "Frequently in resolving the threshold issue of substantiality—i.e., the need for a 3-Judge Court—the Court has to go to the very merits of the case."[9] Such is the case here. After a careful study of the complaint and following a hearing on the question, we are of the unanimous opinion that the State of Alabama's claim does not present a substantial federal question inasmuch as it is foreclosed by prior decisions of the United States Supreme Court.[10]

The Act in question provides:

> *Enrolled*, an Act, To Prevent Discrimination on Account of Race, Color, Creed or National Origin in Connection With the Education of the Children of the State of Alabama. Be it Enacted by the Legislature of Alabama: *Section 1.* No person shall be refused admission into or be excluded from any public school in the State of Alabama on account of race, creed, color or national origin. *Section 2.* No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of achieving equality in attendance or increased attendance or reduced attendance, at any school, of persons of one or more particular races, creeds, colors or national origins; and no school district, school zone or attendance unit, by whatever name

[8] C. Wright, Federal Courts § 16 at 50-53 (2d ed. 1970).

[9] 404 F.2d at 913.

[10] Bailey v. Patterson, 369 U.S. 7 (1962); California Water Service Co. v. Redding, 304 U.S. 252 (1938); Potts v. Flax, 313 F.2d 284 (5th Cir. 1963).

known, shall be established, re-organized or maintained for any such purpose, provided that nothing contained in this section shall prevent the assignment of a pupil in the manner requested or authorized by his parents or guardian, and further provided that nothing in this section shall be deemed to affect, in any way, the right of a religious or denominational educational institution to select its pupils exclusively or primarily from members of such religion or denomination or from giving preference to such selection to such members or to make such selection to its pupils as is calculated to promote the religious principle for which it is established. *Section 3.* The provisions of this Act are severable. If any part of the Act is declared invalid or unconstitutional, such declaration shall not affect the part which remains. *Section 4.* All laws and parts of laws in conflict herewith are hereby repealed. *Section 5.* This Act shall become effective upon its passage and approval by the Governor, or upon its otherwise becoming a law.

The constitutional question involves only Section 2 of the Act. This section purports to make school administrators neutral on the question of desegregation and limits their tools for the accomplishment of this constitutional obligation to "freedom-of-choice" plans. It is clear, indeed, it is insisted by the State of Alabama, that such a limitation is in direct conflict with numerous desegregation plans approved and ordered by federal courts throughout Alabama.[11]

---

[11] Paragraph VI of the complaint provides:

It is further alleged by plaintiffs that the said Act if con-

Brief Appendix B
Opinion and Order of Three-Judge District Court

An unwaivering line of Supreme Court decisions make it clear that more than administrative neutrality is constitutionally required. "Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. Griffin v. School Board, 377 U.S. 218, 234, 12 L.Ed.2d 256, 267, 84 S.Ct. 1226 (1964); Green v. County School Board of Kent County, 391 U.S. 430, 438-439, 442, 20 L.Ed.2d 716, 723, 724, 726, 88 S.Ct. 1689 (1968)."[12] Neither are "freedom-of-choice" plans the optimum tool for the accomplishment of this obligation. In *Green* v. *County School Bd.*[13] the Court held such a plan insufficient, stating, "if there are reasonably available other ways, such

---

stitutional is required to be followed and applied by all courts, state and federal; that where conflict exists between prior orders of any court and the Act the orders should be amended or modified to conform to the provisions of the state law.

The prayer for relief contains the following:

2. By way of supplemental relief, if the said Act is decreed to be constitutional, that this court modify or amend every prior order relating to the public schools issued by it so as to make the orders conform to and not conflict with the provisions of Act No. 1.

5. That defendants Jerris Leonard, as Chief of the Civil Rights Division, be ordered by this court to follow the provisions of said Act No. 1 in all future cases involving the desegregation of the public schools in Alabama and to apply to all courts in Alabama in which he has appeared for modification of prior decrees which now conflict with the provisions of Act No. 1.

[12] Alexander v. Holmes Co. Bd. of Ed., 396 U.S. 19 (1969). *See* United States v. Jefferson County Board of Education, 372 F.2d 836, 845-46 (5th Cir. 1966), *aff'd reh. en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967).

[13] 391 U.S. 430 (1968).

for illustration as zoning,[14] promising speedier and more effective conversion to a unitary, non-racial school system, 'freedom-of-choice' must be held unacceptable."[15]

The settled state of the law convinces us that there is no substantial federal question presented in this case. Where Section 2 of the subject Act conflicts with an order of a federal court drawing its authority from the Fourteenth amendment, the Act is unconstitutional and must fail. The supremacy clause of our compact of government will admit to no other result. Indeed this has already been the result in cases where this and similar legislation has been asserted as a bar to constitutional obligations.[16]

We are also of the unanimous opinion that a three-judge court is not required for the present action under 28 U.S.C. § 2281.[17] However, we are mindful that the question pre-

---

[14] The subject Act expressly prohibits zoning.

[15] *Id.* at 441.

[16] A Three-Judge Court in the Middle District of Alabama in Lee, et al v. Macon Co. Bd. of Ed., Civ. No. 604-E, on three occasions following passage of the Act, refused to modify prior orders to allow the school boards involved to continue to operate under Freedom of Choice: Tuscumbia City Board, order dated March 12, 1970; Colbert County System, order dated March 16, 1970; Monroe County System, order dated March 23, 1970.

In Swain v. Charlotte-Mecklenburg Bd. of Ed., et al., (W.D. N.C., No. 1974, April 29, 1970), a three-judge court held provisions of an analagous North Carolina law unconstitutional insofar as it interfered with the school board's duty to establish a unitary school system.

In Bivins v. Bibb Co. Bd. of Ed. (M.D. Ga. No. 1926, May 22, 1970) the district court enjoined an action in state court which sought an injunction requiring the local board to comply with a similar Georgia statute.

[17] 28 U.S.C. § 2281, provides for a three-judge court where the plaintiff seeks, "An interlocutory or permanent injunction restrain-

sented is important throughout the State of Alabama. Moreover, the ultimate disposition of this case on appeal should be free from unnecessary delay in order to minimize any disruptive effect on the upcoming school year.

Out of an abundance of caution, against the possibility that this case might fall upon the snares described in *Jackson* v. *Choate,* we remand the case for action by a single district judge. The judgment of the district court will become final when joined, through concurrence or dissent, by the other members of the present panel. This assures that, in the event of an appeal, the appropriate appellate court, whether the Court of Appeals or the Supreme Court, will have the entire case for decision.[18]

---

ing the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such statute. . . . " It is a technical statute to be strictly construed. Phillips v. United States, 312 U.S. 246 (1948); C. Wright, Federal Courts § 50 at 189 (2d ed. 1970). For 2281 to apply a state statute must be *challenged* on constitutional grounds in an action in which *injunctive relief* is sought against a state officer who is a party *defendant*. C. Wright, *supra*. The only state officer involved in the instant case is a party plaintiff seeking to uphold the constitutionality of the state statute involved. The injunctive relief requested would operate against officers of the federal government. Inasmuch as the injunctive relief requestd against the federal officers is not related to a constitutional attack on any federal statute, a three-judge court is not required by 28 U.S.C. § 2282.

[18] Rodriguez v. Brown, 299 F. Supp. 479 (W.D. Tex. 1969). *See* Hargrave v. McKinney, 302 F. Supp. 1381 (M.D. Fla. 1969); Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968).

Brief Appendix B
Opinion and Order of Three-Judge District Court

Done at Mobile, Alabama this the 26th day of June 1970.

/s/ WALTER GEWIN
UNITED STATES CIRCUIT JUDGE

/s/ DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

Order of Dismissal

(Filed June 26, 1970)

PITTMAN, District Judge:

For the reasons stated in the opinion of the three-judge panel remanding the present case to a single judge,[1] the same is hereby dismissed.

GEWIN, Circuit Judge, and THOMAS, District Judge, concur in this order.[2]

Done at Mobile, Alabama this 26 day of June, 1970.

/s/ WALTER GEWIN
UNITED STATES CIRCUIT JUDGE

/s/ DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE

/s/ VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

---

[1] Opinion of Judges Gewin, Thomas, and Pittman, dated June 26th, 1970.

[2] See note 18 and accompanying text of the three-judge opinion.